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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 229.

GEORGE L. RICH, PLAINTIFF IN ERROR,

vs.

THE TOWN OF MENTZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 20, 1886.

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DECLARATION.

Pleas in the United States Circuit Court for the Northern District of New York of March Term 1882.

GEORGE L. RICH
vs.
THE TOWN OF MENTZ.

George L. Rich of Fort Dodge in the State of Iowa, a citizen of the United States, plaintiff in this action by James R. Cox his attorney, complains of the Town of Mentz defendant, that the said defendant is a municipal corporation of the State of New York in said district, by declaration filed in this case, and not by writ, of a plea of trespass on the case, as follows:—

For that whereas heretofore, by a certain act of the
6 legislature of said state of New York entitled "An act to amend an act, entitled, an act to authorize the formation of railroad companies and to regulate the same passed April 2, 1850, so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, it was in substance enacted that a majority of the taxpayers of any such municipal corporation, owning or representing a majority of the taxable property of said town, might present their petition to the county judge of their county, setting forth the facts as provided by said acts, expressing their desire to aid in the construction of
7 such railroad in this state as is named in their petition; and that thereupon the said county judge shall order a notice to be forthwith published in a newspaper, published in such county, directed to whom it may concern, setting forth that upon a day therein named, he will proceed to take proofs of the facts set forth in said petition.

And it was further provided in and by said act, that upon taking such proofs as aforesaid after such notice and publication, that the said county judge, should upon being satisfied judicially of the majority of such taxpayers
8 as in said act provided, were in favor and united in said petition for the bonding of their town in aid of such railroad to a lawful amount, that then he should so adjudge and determine, and should cause such judgment to be entered of record in the clerk's office of said county, and should forthwith appoint certain commissioners to discharge the duties in furtherance of said petition, as defined by said act; as by reference to said act, with the amendments thereto, will more fully and at large appear; by which act the full details and plan for bonding towns in

this state of New York, and the payment of interest and principal of the bonds are fully provided for and defined.

And the plaintiff further says, that in pursuance of said acts, on or about the month of May, 1872, a certain petition of the taxpayers of said Town of Mentz, in all respects in accordance with the requirements of said acts, was duly presented to the Hon. Wm. E. Hughitt who 9
was then the county judge of the county of Cayuga, praying for the usual proceedings to be taken, and setting forth the requisite facts of majority of taxpayers, the railroad company, to wit: "The Cayuga Northern Railroad Company" which was a railroad company duly incorporated and existing in and under the laws of this state and was projected to be constructed and run through said town of Mentz, the amount of aid by bonds of said town desired by said taxpayers, that is to say $30,000, which was within 20 per cent. of the assessed value of
said town; and praying for the appointment of commis- 10
sioners, and the favorable judgment of said county judge pursuant to statutes aforesaid.

And thereupon the said county judge did make the order provided for, and appointed the 8th day of June, 1872, as the day of examination into the facts alleged in said petition, and caused the notice required to be duly published in "*The Auburn Daily Advertiser*" a newspaper published in said county of Cayuga, setting forth the time and place of such examination, in all respects according to said acts. 11

And in pursuance of said notice at the time and place as published, the said county judge did proceed to take the proofs as contemplated by said act, as to the said alleations in the said petition.

And afterwards the said county judge after judicially determining the facts alleged, did make up his judgment thereon in writing and filed the same in the office of the clerk of said county, to the effect that the said petitioners did represent a majority of the taxpayers of the said town of Mentz as shown by the last preceding assessment-roll
of said town, representing a majority of the taxable prop- 12
erty thereof according to said assessment roll, and that commissioners should be duly appointed to carry into effect the objects of said statute, and to subscribe for $30,000, of the stock of said Cayuga Northern Railroad Company, and issue the bonds of the town therefor in pursuance of said acts.

Which judgment still remains in said office, filed July 17, 1872, and duly recorded, and is in full force and effect.

And thereupon the said county judge made the usual order authorized by said acts, and [illegible] published the same in the said newspaper by which three certain citizens, residents and taxpayers of said town of Montz, to wit: Wm. A. Halsey, E. R. Somers and J. H. Wesley were duly appointed commissioners of said town, with authority to execute the bonds of said town of Montz to the amount of $20,000, to subscribe to the stock of said railroad company, and to invest said bonds or the proceeds thereof in the said stock as per.

Said commissioners thereupon duly accepted said office and qualified to the same, and the said town of Montz not having any corporate seal, they did on or about the 1st of August, 1872, duly cause to be executed the bonds of said town in pursuance of their power and authority, which bonds were in all respects alike, except as to their several numbers, and were in the words and figures as follows, that is to say:

United States of America,
State of New York, Town of Montz.
County of Cayuga.

Issued by virtue of an act of the legislature of the State of New York, entitled "An act to amend an act entitled, an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, so as to permit municipal corporations to aid in the construction of railroads, passed May 13, 1869."

This act authorizes the town of Montz in the county of Cayuga to subscribe to the stock of the Cayuga Northern Railroad Co. and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said act is $20,000.

Know all men by these presents, that we, the undersigned commissioners under the above entitled acts for the town of Montz, in the county of Cayuga and state of New York, upon the faith and credit and in behalf of said town, for value received promise to pay to the bearer the sum of one thousand dollars on the 1st day of July in the year one thousand nine hundred and two (1902) at the Fourth National Bank of New York in the city of New York, with interest at seven per cent per [illegible] from and after the 15th day of July, 1872, [illegible] annually upon the 15th days of July and January [illegible] at the same place, on the presentation [illegible] of the coupons for such interest hereto

In witness whereof we have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by W. A. Halsey one of our number, this 15th day of July in the year one thousand eight hundred and seventy-two.

E. B. SOMERS, (L. S.)
W. A. HALSEY, (L. S.) 17
J. H. WETHEY. (L. S.)

Annexed to each of said bonds there were in all 60 coupons, each for the payment of $35 of interest in all for each of said prospective payments of interest on the 15th days of January and July thence forward to the year 1902, all payable at the said bank at maturity.

And thereupon the said commissioners as in duty bound did subscribe in behalf of the said town for the stock of the said railroad company, and did receive from the said company its certificates of shares or script to the 18
amount of $30,000 at par; and did pay for the same by issuing to the said company the bonds of said town as aforesaid to the amount of $30,000 being in all thirty of said bonds above described with their appropriate coupons.

And afterwards the said railroad company in the usual course of their business in paying for rights of way and preparing for the construction of their railroad in said town, sold to divers purchasers for value, and such purchasers bought several of said bonds, with their coupons 19
aforesaid attached; and afterwards in the usual course of business and for value, paid certain of them viz: Numbers (21) twenty-one, (22) twenty two, (23) twenty-three, (24) twenty-four and (25) twenty-five, to wit five several bonds with their coupons came to the possession, ownership and control of this plaintiff and he now owns and holds the same.

And the plaintiff further says that the said defendants although they did raise the money and did for some of the first years pay the interest on said bonds did not after 20
the year 1875 pay any more interest; nor did they nor their officers, agents or commissioners provide or have any funds whatever from that time to the present, to meet the semi-annual interest on said bonds at any time of semi-annual payment, that is at any 15th day of January and July, since the year 1875, to meet said payment at said bank; but have hitherto neglected and still do neglect to provide for or to pay the said interest or any part thereof.

And thereupon the said county judge made the usual order authorized by said acts, and duly published the same in the said newspaper, by which three certain citizens, residents and taxpayers of said town of Mentz, to wit: Wm. A. Halsey, E. B Somers and J. H. Wethey were duly appointed commissioners of said town, with
13 authority to execute the bonds of said town of Mentz to the amount of $30,000, to subscribe to the stock of said railroad company, and to invest said bonds or the proceeds thereof in the said stock at par.

Said commissioners thereupon duly accepted said office and qualified to the same; and the said town of Mentz not having any corporate seal, they did on or about the 1st of August, 1872, duly caused to be executed the bonds of said town in pursuance of their power and authority, which bonds were all alike, (except as to their several
14 numbers) and were in the words and figures as follows, that is to say:

No. 21, United States of America, $1000

State of New York, Town of Mentz,

County of Cayuga.

Issued by virtue of an act of the legislature of the state of New York entitled "An act to amend, an act entitled, an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, so
15 as to permit municipal corporations to aid in the construction of railroads, passed May 18, 1869.

This act authorizes the town of Mentz in the county of Cayuga to subscribe to the stock of "The Cayuga Northern Railroad Co., and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said act is $30,000.

Know all men by these presents, that we, the undersigned commissioners under the above entitled acts, for the town of Mentz, in the county of Cayuga and state of
16 New York, upon the faith and credit and in behalf of said town, for value received promise to pay to the bearer the sum of one thousand dollars on the 1st day of July in the year one thousand nine hundred and two (1902) at the Fourth National Bank of New York in the city of New York, with interest at seven per cent per annum, from and after the 15th day of July, 1872, payable semi-annually upon the 15th days of July and January in each year at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

In witness whereof we have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by W. A. Halsey one of our number, this 15th day of July in the year one thousand eight hundred and seventy-two.

E. B. SOMERS, (L. S.)
W. A. HALSEY, (L. S.) 17
J. H. WETHEY. (L. S.)

Annexed to each of said bonds there were in all 60 coupons, each for the payment of $35 of interest in all for each of said prospective payments of interest on the 15th days of January and July thence forward to the year 1902, all payable at the said bank at maturity.

And thereupon the said commissioners as in duty bound did subscribe in behalf of the said town for the stock of the said railroad company, and did receive from the said company its certificates of shares or script to the 18 amount of $30,000 at par; and did pay for the same by issuing to the said company the bonds of said town as aforesaid to the amount of $30,000 being in all thirty of said bonds above described with their appropriate coupons.

And afterwards the said railroad company in the usual course of their business in paying for rights of way and preparing for the construction of their railroad in said town, sold to divers purchasers for value, and such purchasers bought several of said bonds, with their coupons 19 aforesaid attached; and afterwards in the usual course of business and for value, paid certain of them viz: Numbers (21) twenty-one, (22) twenty two, (23) twenty-three, (24) twenty-four and (25) twenty-five, to wit five several bonds with their coupons came to the possession, ownership and control of this plaintiff and he now owns and holds the same.

And the plaintiff further says that the said defendants although they did raise the money and did for some of the first years pay the interest on said bonds did not after 20 the year 1875 pay any more interest; nor did they nor their officers, agents or commissioners provide or have any funds whatever from that time to the present, to meet the semi-annual interest on said bonds at any time of semi-annual payment, that is at any 15th day of January and July, since the year 1875, to meet said payment at said bank; but have hitherto neglected and still do neglect to provide for or to pay the said interest or any part thereof.

I. And for a first cause of action the plaintiff says that there is due to him from said defendants by reason of the premises, upon said bond No. 5, the sum of four hundred and fifty dollars of interest.

II. And for a second cause of action, the plaintiff says that there is due to him from said defendants by reason of
21 the premises upon said bond No. 21, the sum of four hundred and fifty dollars of interest.

III. And for a third cause of action the plaintiff says that there is due to him from said defendants by reason of the premises upon said bond No. 22, the sum of four hundred ond fifty dollars of interest.

IV. And for a fourth cause of action the plaintiff says that there is due to him from said defendants by reason of the premises upon said bond No. 23 the sum of four hundred and fifty dollars of interest.

V. And for a fifth cause of action the said plaintiff
22 says that there is due to him from the said defendants by reason of the premises upon said bond No. 24 the sum of four hundred and fifty dollars interest.

VI. And for a sixth cause of action the plaintiff says that there is due to him from said defendants by reason of the premises upon said bond No. 25 the sum of four hundred and fifty dollars of interest.

And so the said plaintiff brings here into court the said several coupons, to wit 12 coupons from each bond in all seventy-two coupons representing together the interest
23 payable on said bonds for the past six years; and hereby offers to surrender the same; and asks for the judgment of this honorable court upon the said bonds for the sum of twenty-eight hundred dollars against the said defendant, besides the costs of this action.

JAS. R. COX,
Pl'ff's Att'y.

United States Circuit Court, for the Northern District of New York.

GEORGE L. RICH, plaintiff,
against
24 THE TOWN OF MENTZ, defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of the service; and in case of your failure to appear or answer judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of Utica, this 22d day of March, in the year one thousand eight hundred and eighty-two.

[L. S.] WILLIAM H. BRIGHT, *Clerk*,
JAMES R. COX, *Plaintiff's Attorney.* 25
Office and post office address, Auburn, New York.

A true copy.

Attest: WILLIAM H. BRIGHT, *Clerk*.

Endorsed as follows: No. 2377. United States Circuit Court, Northern District of New York. George L. Rich *vs* The Town of Mentz; copy of summons for defendants; James R Cox, plaintiff's attorney; to the defendant within named: Take notice, That upon default judgment will be taken for the sum of $2800 in money, with interest from the 15th day of July, 1881, 26
besides costs.

JAMES R. COX, *Plaintiff's Attorney*,
Auburn, N. Y.

United States Circuit Court, Northern District of New York.

GEORGE L. RICH,
against
THE TOWN OF MENTZ.

Amended Answer.

The defendant in this action answering the complaint 27
herein, by F. D. Wright of the city of Auburn, its attorney by this its amended answer, answers the complaint in this action as follows:

I. For a first defense and amended answer, the defendant denies each and every allegation in the complaint contained.

II. For a second defense and amended answer, the defendant answers and shows that this defendant has not by virtue of its organization or otherwise, any power or authority to issue bonds or obligations, or to become 28
obligated by the issue of bonds professedly in its behalf, to aid in the construction of the railroad mentioned in the complaint.

III. For a third defense and amended answer, this defendant avers that there was never any sufficient petition executed by the taxpayers of the town of Mentz, or presented to the county judge of Cayuga county, nor one which conferred any jurisdiction upon him to take any steps or proceedings under the same, or to appoint

commissioners for said town in that behalf and no petition in that behalf was ever presented to said county judge which set forth that the persons subscribing as petitioners, constituted a majority of the tax payers of said town appearing upon the last preceding assessment-roll not including those taxed for dogs and not including
29 those taxed for highway tax only, as was required by and after the passagee of the act of the legislature of the State of New York, entitled:

"An Act to amend chapter 907 of the laws of 1869, entitled An Act to amend an act entitled 'An Act to authorize the formation of railroad corporations and to regulate the same'" passed April 2, 1850, etc.

And by section one of said act aforesaid so passed, and which act is chapter 925 of the laws of the State of New York passed in the year 1871 by the legislature of said State aforesaid, on May 12 of said year.

30 IV. For a fourth amended answer and defense, the defendant avers on information and belief that said pretended Cayuga Northern Railroad Company never had any legal or corporate existence and that it was never legally formed, or formed in pursuance to the laws and statutes of the State, and for the following among other reasons, viz:

That as the defendant is informed and believes the ten per cent. on the stock subscribed was not paid in in cash as required by law.

31 That a large amount of stock subscribed for was never in fact actually paid in by the subscribers, as required by law, in cash, as the defendant is informed and believes.

That as the defendant is informed and believes, the requisite amount of stock required by law was never in fact and in good faith subscribed for or paid in as required by the laws of this State.

That as the defendant is informed and believes, no subscription was in fact made by the pretended commissioners to the stock of said pretended railroad company,
32 nor was any certificate of stock in fact issued by them in behalf of this defendant. That the defendant is informed and believes that said pretended railroad company was never legally organized. That the required number of directors were not elected, appointed or chosen to be charged with the management of its affairs, for the first year of its pretended existence. That no more than seven persons were designated, appointed or elected to be charged with such management during and for the first year of its pretended existence and in con-

travention of the laws of this State passed 1854, chapter 282, section one and entitled "An Act to amend the act entitled 'An Act to authorize the formation of railroad corporations and to regulate the same,'" passed April 2, 1850.

V. For a fifth and further amended defense and answer, the defendant alleges on information and belief that all 33
of the said bonds and interest coupons mentioned in the complaint which appear by the complaint to have been dated, created and issued July 15th, 1872, were so made and issued and dated before said pretended commissioners had taken or filed their respective oaths of office and before they had any authority pretended or actual to issue or create said bonds, and who had not at said time been appointed such commissioners aforesaid, for which reason the same are illegal, unauthorized and void.

VI. For a sixth and further amended answer and 34
defense, the defendant alleges on information and belief that each and all of the bonds mentioned in the complaint purport to have been issued by virtue of an act of the legislature of this State which passed on May 18th, 1869, amendatory of an act passed April 2, 1850.

That in fact the said act passed April 2, 1850, and amended May 18th, 1869, had been as to several of its material sections and provisions, repealed and amended and that among other material changes, section first of said act passed on May 18th, 1869, had been wholly 35
changed and repealed by the act amending the same passed on May 12, 1871, and particularly by section first of said last mentioned act, and that said bonds do not purport to have been issued under or in pursuance of said act of May 12, 1871, neither were they in fact issued under that act or under such amendment and that said bonds do not purport to have been issued under any statute which in fact was existing and in force when they purport to have been made and are therefore illegal and void.

VII. For a seventh amended answer and defence, the 36
defendant alleges on information and belief that the said bonds and coupons sued on in this action, and all issued by said pretended railroad commissioners, were so created and dated and issued by said pretended railroad commissioners on July 15, 1872, and said bonds with the coupons thereon were issued, to run for a period of less than thirty years from that date, and the whole amount of each bond became due and payable in the period of one

year, to wit in the year 1902, and were so issued and made payable on July 15, 1902, in violation of section 6 of chapter 925 of the laws of 1871, of the State of New York, for which reason the same are unauthorized and void.

VIII. For an eighth and further amended answer and
37 defense, the defendant alleges on information and belief that the defendant is not a bona fide owner and holder of said bonds or coupons, in the regular course of business, for value (the said bonds and coupons, meaning those sued on in this action) and that the same have been simply in form transferred to him, without any real or valuable consideration, and for the purpose of enabling an action to be brought in this Court, and that said plaintiff is not a bona fide holder or purchaser in good faith, of the same before due or for value. That he is
38 not the real owner nor party in interest of, or in said bonds and coupons, nor of any of the same, and that in fact, the same are owned by a corporation or party within this state, but whose name is unknown to this defendant.

IX. For a ninth defense and amended answer, this defendant avers that neither of said bonds and neither of said coupons sued on in this action had or have any legal inception, or any valid existence, but each and all of the same are absolutely illegal, unauthorized and void, and are neither a valid debt against this defendant.

X. For a tenth defense and amended answer, the
39 defendant denies that any of the causes of action set out in the complaint, occurred within six years, next preceding the commencement of this action, and avers that each of said pretended causes of action, accrued more than six years preceeding the commencement of this action, and are barred by the statute of limitations.

Wherefore defendant demands that the complaint be dismissed and that this defendant recover his costs and disbursements in this action against the plaintiff.

F. D. WRIGHT,
Attorney for Defendant.
40 Office and P. O. address, 96 Genesee street, Auburn, N. Y.

United States Circuit Court, Northern District New York.

Case and Special Findings

GEORGE L. RICH.
vs.
THE TOWN OF MENTZ } 41

This cause came on for trial at a regular term of the Court, held at the court house in the city of Syracuse, November 21, 1884, before Hon. Wm. J. Wallace and Hon. Alfred C. Coxe, Judges, sitting together; the trial by jury being waived by written stipulation duly executed by both parties, and filed with the clerk of said Court.

And thereupon the said plaintiff offered certain proofs establishing the following facts, which were specially found by the Court, as follows:

Special Findings. 42

I. On the 18th day of July 1872, there was filed in the clerks office of the County of Cayuga, N. Y., the judgment of the County Judge of said county, with the petition of certain taxpayers, of which the following are copies:

County of Cayuga, N. Y.

In the matter of the application of the taxpayers of the Town of Mentz, Cayuga County, N. Y. } *Petition.*

To the Honorable the County Judge of the County of Cayuga, N. Y. 43

The petition of the subscribers hereto respectfully shows: That they are a majority of the taxpayers of the town of Mentz, in the County of Cayuga, and State of New York, whose names appear upon the last preceding assessment-roll or tax-list of said town of Mentz, as owning or representing a majority of the taxable property in the corporate limits of the said town of Mentz; that they are such a majority of taxpayers, and are taxed or assessed for, or represent such a majority of taxable property; that they desire that said town shall create and issue its bonds to the amount of thirty thousand dollars ($30,000,) which said amount does not exceed twenty per centum of the whole amount of taxable property, as shown by said assessment-roll or list, and invest the same, or the proceeds thereof in the stock of the Cayuga Northern Railroad Company, which is a Railroad Company in the State of New York. 44

And your petitioners pray your Honor to cause to be published the proper notice, to take proof of the facts set forth in this petition; and that such proceedings may be had thereon as are authorized and prescribed by the statutes of the State of New York, in such case made and provided.

45 Dated April 20, A. D. 1872.

(Signed by) A. M. GREEN,
and 224 other names.

STATE OF NEW YORK, } ss.
Cayuga County. }

Archibald M. Green of the town of Mentz, in the County of Cayuga and State of New York, being duly sworn, doth depose and say, that he is one of the petitioners herein, and whose name is subscribed by him to the foregoing petition; that he has read the foregoing
46 petition and knows the contents thereof. and that the same is true of his own knowledge, except those matters therein stated on information and belief and as to those matters he believes it to be true.

Subscribed and sworn before me this 28th day of May, 1872. A. M. GREEN.

W. E. HUGHITT,
Cayuga County Judge.

47

County of Cayuga, N. Y.
In the matter of the application of the taxpayers of the Town of Mentz, Cayuga County, N. Y. } *Order of County Judge.*

On the petition herein bearing date the 20th day of April, A. D. 1872, and on motion of H. V. Howland, attorney for said petitioners, it is ordered that a notice forthwith published in the Auburn Daily Advertiser, a
48 newspaper published in the said County of Cayuga, directed to whom it may concern, and setting forth that on the 8th day of June, A. D. 1872, at 10 o'clock in the forenoon of that day, that I, William E. Hughitt, county judge of the County of Cayuga, in the State of New York, will proceed to take proof of the facts set forth in said petition, as to the number of taxpayers joining in said petitition, and as to the amount of taxable property represented by them; and that such proof will be taken at the grand jury room, in the court house

in the city of Auburn, in said County of Cayuga, N. Y.

Dated this 28th day of May, in the year of our Lord 1872.

W. E. HUGHITT,
Cayuga County Judge.

(Endorsed, filed May 28, 1872.)

(Then follows the usual affidavit of the printers of said 49
newspaper, showing due publication of the notice of hearings.)

County of Cayuga.

In the matter of the application of the Taxpayers of the Town of Mentz. } *Judgment.*

Upon the filing the petition herein and order made thereon, with a copy of the notice to take proof of the facts set forth in said petition, and the affidavit of publication of the said notice in the matter required by law, 50
and by the order made in this proceeding as aforesaid, together with the testimony taken therein; and it appearing to the satisfaction of the Court, that the whole number of taxpayers in the town of Mentz, Cayuga County and State of New York, whose names appear upon the last assessment-roll or tax-list for the year 1871, is 434, and that of this number 225 have signed the said petition, being more than one-half of said taxpayers; and it further appearing that the total valuation of the taxable property of the said town of Mentz upon the said assessment roll or tax list, is five hundred and forty 51
thousand six hundred and forty-five dollars, and that the valuation of the property of the petitioners as represented upon the said roll or tax list is $312,350 (dollars), being thirty-one thousand and twenty eight dollars in excess of one-half of the total valuation of the taxable property of said town of Mentz.

Now on motion of H. V. Howland attorney for said petitioners, it is adjudged, decreed and determined that the said petitioners do represent a majority of the taxpayers of said town of Mentz as shown by the last pre- 52
ceding tax-list or assessment-roll, that is to say, the said tax-list or assessment-roll for the year 1871, and do represent a majority of the taxable property upon said tax-list or assessment-roll.

And it is hereby ordered, that William A. Halsey, E B. Somers and J. H. Wethey, three freeholders, residents and taxpayers within the corporate limits of the said town of Mentz be, and they hereby are appointed commissioners for the period of five years next ensuing,

and until others are appointed by a county judge of this county, or other competent authority, to cause, or execute in due form of law, with all reasonable dispatch, bonds of the said town of Mentz, of the amount of $100 each, to the amount of thirty thousand dollars, and to issue or sell the same, or dispose of the same and invest
53 the same or the proceeds thereof, in and to subscribe in the name of the said town of Mentz, to the stock of "The Cayuga Northern Railroad Company" to the amount of $30,000; and that the said commissioners and each of them shall have all the powers and be subject to the same duties and liabilities, imposed and prescribed in and by the act of the legislature of the State of New York entitled "An Act to amend an act to authorize the formation of railroad companies and to regulate the same," passed April 2d, 1850, (and all other acts pertaining to that subject) "so as to permit municipal cor-
54 porations to aid in the construction of railroads," passed May 18, 1869, and the several acts amendatory thereof and supplementary thereto.

And it is further adjudged and ordered, that notice of the final determination herein as aforesaid, be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said County of Cayuga, once in each week for three weeks.

Dated July 17, 1872.

W. E. HUGHITT,
55 *Cayuga County Judge.*

(Endorsed, filed July 17, 1872.)

(Due proofs were made of publication of the foregoing determination.)

II. The Cayuga Northern Railroad Company was duly incorparated under the general statutes of the State, on the 22d of April, 1872.

III. The persons named in said adjudication of the county judge aforesaid, qualified as commissioners under the statute and subscribed, in behalf of said town of
56 Mentz for 300 shares of the capital stock of said company, of the par value of $100 per share, and paid therefor by the issue to said company of thirty town of Mentz bonds of $1,000 each, in form as set out in the complaint with coupons attached in the usual form, providing for the payment of interest semi-annually, January and July; principal payable July 15, 1902.

The coupons were all in the following form:

"$35.00.

The town of Mentz, county of Cayuga, will pay the

bearer hereof at the Fourth National Bank of New York, in the city of New York, on the 15th day of July, 1876, the sum of thirty-five dollars, for six months interest then due on bond No. 7.

$35.00.] W. A. HALSEY,
Commissioner."

IV. Prior to the commencement of this action the 57
plaintiff became a purchaser of the five bonds and attached coupons which are described in the declaration in this action, from one Deming, who had theretofore purchased the same for cash and without notice of any infirmity; the plaintiff being a resident citizen of the state of Iowa.

V. Plaintiff produced said five bonds, with twelve coupons each $35 cut from each, in all sixty coupons, which with the interest to the day of trial amounted to $2,836.25.

VI. That no part of said railroad has ever been built; 58
but the town of Mentz raised the money by tax, according to said statute, and has paid the coupons of the entire issue, which fell due January 15, 1873; the town has never paid any other coupons and said commissioners have retained and now hold the usual certificates of stock in the said railroad company, 300 shares, received by them at the time of the delivery of said bonds to the railroad company.

VII. All the proofs were taken subject to defendant's 59
objection, that the County Judge acquired no jurisdiction under the original petition, and also that the judgment of the County Judge was insufficient.

And defendant insisted upon the aforesaid objection, and prayed for a dismissal of the complaint, with costs.

Whereupon the said judges of the Court being divided in opinion, as to the sufficiency of the said petition, and of the adjudication and judgment of the County Judge of Cayuga County, judgment in this cause for the time being was ordered for the defendant, in accordance with the opinion of Hon. W. J. Wallace, Circuit Judge.

And the counsel for the plaintiff then and there in 60
due time and form of law excepted to the said decision and judgment.

WM. J. WALLACE.

United States Circuit Court, Northern District of New York:

Certificate of Judges on Division of Opinion.

GEORGE L. RICH,
vs.
61 THE TOWN OF MENTZ.

We, the judges of said Court who sat at the trial thereof having ordered judgment for the defendant therein according to the statute, hereby certify that upon the said trial a division of opinion upon material questions arose, which we now certify to the Supreme Court of the United States, that is to say:

First. Was the petition of certain taxpayers of the town of Mentz, which was presented to the County Judge of Cayuga County in the State of New York, on
62 the 28th day of May, 1872, and a copy of which is set forth in the finding and decision of the Court, sufficient in the form and substance of its recital, to authorize the said County Judge to take jurisdiction and proceed to render an adjudication pursuant to chapter 907 of the laws of New York of 1869, as amended by chapter 925 of the laws of New York of 1871?

Second. Was it essential in order to confer jurisdiction upon said County Judge, to adjudicate pursuant to section 2 of chapter 907 of the laws of 1869, as amended
63 by section 2 of chapter 925 of the laws of 1871, that the petition should state among other things in substance that the taxpayers petitioning, were a majority of taxpayers of the town of Mentz, who were taxed or assessed for property not including those taxed for dogs or highway tax only?

Third. Was the adjudication of the County Judge of Cayuga County, made on the 17th day of July, 1872, a copy of which is set forth in the findings and decision of the Court, sufficient to authorize the defendant to
64 create and issue its bonds pursuant to chapter 907 of the laws of New York, of 1869, as amended by chapter 925 of the laws of New York, of 1871?

Fourth. Was it essential in order to confer authority upon the defendant to create and issue its bonds under said laws of 1869 and 1871, that the adjudication or judgment of the County Judge should declare in substance that the quorum of taxpayers who desired that the defendant should create and issue its bonds, was one

exclusive of taxpayers who were assessed or taxed for dogs or highway tax only?

WILLIAM J. WALLACE,
ALFRED C. COXE.

65

At a Circuit Court of the United States for the Northern District of New York, held at the court house in the village of Canandaigua on the 15th day of June, 1886.

Present—Hon. William J. Wallace, Circuit Judge, Alfred C. Coxe, District Judge.

George L. Rich,
vs.
The Town of Mentz. } *Order and Certificate.*

This cause having heretofore been brought to trial 66
and submitted for decision to the said judges, sitting together, a trial by jury having been expressly waived by agreement in writing, duly executed and filed with the clerk:

Now, on motion of Mr. James R. Cox, plaintiff's attorney, for judgment, after hearing Mr. F. D. Wright opposed; it appears that there is a division of opinion as to material questions necessarily arising upon said trial, and that the opinion of the circuit judge is in favor of the said defendant on said questions; and the opinion of the district judge, Hon. Alfred C. Coxe, is in favor 67
of the plaintiff on the same questions:

Now therefore, in accordance with the statute in such case provided, the opinion of the said circuit judge shall for the time being, prevail.

Therefore, it is adjudged, that the plaintiff is not entitled to recover judgment against the defendant in this action, and that his complaint be dismissed, and that the defendant recover the costs of this action to be taxed, and have the usual execution therefor.

WILLIAM J. WALLACE. 68

Circuit Court of the United States, Northern District of New York:

George L. Rich,
vs.
The Town of Mentz. } *Judgment.*

At a stated term of this court, held at the court house

in the village of Canandaigua, in the northern district of New York, June 15, 1886:

Present—Hon. William J. Wallace, Circuit Judge, Hon. Alfred C. Coxe, District Judge.

This cause having been tried at a previous term of this Court, before the circuit and district judges afore-
69 said, a jury having been waived, it is now, on motion of the defendant's attorney, adjudged that plaintiff take nothing by his complaint, and the defendant recover its costs and disbursements in this action, which have been taxed at fifty dollars, and have execution therefor.

WILLIAM J WALLACE.

Judgment signed and entered this fifth day ot October, A. D. 1886, at one o'clock P. M.

W. S. DOOLITTLE, *Clerk.*

70

United States of America, } ss:

The President of the United States to the Honorable, the Judges of the Circuit Court of the United States for the Northern District of New York—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court before you, between George L. Rich, plaintiff,
71 and The Town of Mentz, defendant, manifest errors have happened, to the damage of the said plaintiff, George L. Rich, as by his complaint appears. We being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to said parties in this behalf, do command you, if judgment be therein given, that then under your seals distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have
72 the same at Washington on the second Monday of October, inst., in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct those errors, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 5th day of October, A. D. 1886.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States
[L. S.] *for the Northern District of N. Y.*

Allowed.

W. J. WALLACE. 73

United States Circuit Court, Northern District of New York.

GEORGE L. RICH,
vs.
THE TOWN OF MENTZ.

It is hereby stipulated by and between the attorneys for the parties hereto, that the foregoing pages, numbered from 1 to 22 inclusive, constitute the transcript of record 74 in this case, on return to the writ of error herein.

JAMES R. COX,
Attorney for Plaintiff.

F. D. WRIGHT,
Attorney for Defendant.

UNITED STATES OF AMERICA, Northern District of New York. } ss:

I, W. S. Doolittle, clerk of the Circuit Court of the 75 United States of America, for the Northern District of New York, in the Second Circuit, do hereby certify, that the foregoing pages, numbered from 1 to 36, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of George L. Rich *vs.* Town of Mentz, as the same remain of record, and on file in said office, and as the same have been stipulated by and between the attorneys for the respective parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, 76 at Utica, in said Northern District of New York, in the Second Circuit, this 5th day of
[L. S.] October, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence, the one hundred and eleventh.

W. S. DOOLITTLE,
Clerk.

United States Circuit Court, Northern District of New York.

GEORGE L. RICH
vs.
THE TOWN OF MENTZ.

JAMES R. COX, for the plaintiff.

77 F. D. WRIGHT, for the defendant.

COXE, J.

This action is upon coupons cut from bonds purporting to have been issued by the defendant. At the trial, the plaintiff had a verdict. The defendant now moves for a new trial.

The point disputing the sufficiency of the petition, is the only one that will be considered.

The petition was presented to the county judge, in May, 1872. At that time, chapter 925 of the laws of 78 1871 were in force. Section 1 provides:

"Whenever a majority of the tax-payers of any municipal corporation, in this state, who are taxed or assessed for property, *not including those taxed for dogs or highway tax only*, upon the last preceding assessment roll, or tax list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property upon said last assessment roll or tax-list, shall make application to the county judge of the county in which such municipal corporation is situate, by petition, veri-
79 fied by one of the petitioners, setting forth that they are such majority of tax payers, and are taxed or assessed for, or represent such majority of taxable property, and that they desire, etc., etc. * * * The words, 'municipal corporation,' when used in this act, shall be construed to mean any city, town, or incorporated village in this state, and the word '*tax-payer*,' *shall mean* any corporation or person assessed or taxed for property, either individually, or as agent, trustee,
80 guardian, executor, or administrator, or who shall have been intended to have been thus taxed, and shall have paid or are liable to pay, the tax as hereinbefore provided, or the owner of any non-resident lands taxed as such, *not including those taxed for dogs or highway tax only*, and the words 'tax-list or assessment roll' when used in this act, shall mean the tax list or assessment roll of said municipal corporation last completed before the first presentation of such petition to the judge."

The *petition* is in the following words:

> To the Honorable, the County Judge of the County of Cayuga, N. Y.:
>
> The petition of the subscribers hereto respectfully shows *that they are a majority of the tax-payers* of the town of Mentz, in the county of Cayuga and state of New York, whose names 81
> appear upon the last preceding assessment-roll or tax-list of said town of Mentz, as owning or representing a majority of the taxable property in the corporate limits of the said town of Mentz, that they are such a majority of tax-payers, and are taxed or assessed for, or represent such a majority of taxable property, etc., etc."

It is *argued* that the omission of the words "not including those taxed for dogs or highway tax only," from the petition, rendered the whole proceedings before the county 82
judge, *coram non judice*, null and void.

The state courts have adopted this view in several reported cases.

> People vs Spencer, 55 N. Y.
> People vs. Smith, *id.* 135.
> Wellsboro vs, N Y., and C. R. R., 76 N. Y., 182.
> Metzger vs. Attica Railroad, 79 N. Y., 171.

After careful consideration, it is thought that the petition contains all that the law requires.

The pleader looked at the act and saw the word, "*tax-payer*," there defined, to mean a person taxed for property, "*not including* those taxed for dogs or highway tax 83
only." A person taxed only for these *was not*, so far as the bonding proceedings were concerned, *a tax payer*.

When the petition recited that the petitioners were a majority of the tax-payers, why did it not recite all that the strictest interpretation of the law required.

Those taxed for dogs, etc., were *not tax-payers*. Can it be possible that it was necessary for the petitioners, having shown what they were, to show, in addition, what they *were not*. 84

They might have recited that they were *not* aliens or indians, or infants, or lunatics, or taxed for dogs only, they might have alleged, affirmatively, that some of the signers were "corporations," that others were "assessed or taxed for property, * individually," others still, "as agents," or "trustees."

They did not proceed, however, upon any such awkward and cumbersome theory.

The act provides that certain parties shall be deemed tax-payers, others shall not. It does not make two classes of tax-payers, by any means; it makes *one* class, and declares that all who are not in that class, are not tax-payers. The law said to the pleader and to the judge, use the word "taxpayer," for by so doing, you include all
85 who have a right to sign, and exclude all who have not that right. A person, taxed only for a dog, could not sign a petition which stated that he was a tax-payer.

An affidavit avering that the signers were all tax-payers, would be false. Suppose that the statute, instead of including corporations in the definition of "tax-payer," had excluded them.

Would it still have been necessary to allege in the petition that the "petitioners are a majority of the tax-payers, *excluding corporation?*" No! because the act by
86 express terms had made this unnecessary.

The petition was drawn under and refers to the law; its language is equivalent to the language of the statute. The same section defines the words, "municipal corporation," to mean any "city, town or incorporated village."

The petitioners allege that "they are a majority of the tax-payers of the town of Mentz." Why is not the petition criticised for omitting to state that the town of Mentz is a "municipal corporation?" Doubtless because the act provides that the word "town," and the words, "municipal corporations," are synonymous, and any fur-
87 ther description would be a useless verbiage.

The object of the petition is to place the subject before the county judge for judicial enquiry, it is not *evidence* of any fact upon which the judge can act. He is required to take proof at the hearing, at which time tax-payers *not on the petition*, may appear before him and be counted. (Sec. 2.)

As well might it be asserted that the petition should set forth a copy of the assessment-roll with metes and bounds of every taxpayer's real estate, and a full abstract
88 of title, together with other *evidence* of his right to sign the petition, as that it should set forth the negative averment as to dogs, etc.

It will be observed that the definition of the word "Taxpayer" and the words, "Excluding those taxed for dogs," etc., appear for the first time in the act of 1871.

Without this definition there would be some plausibility in the argument of the defendant; with it, the position becomes untenable. To reiterate what has been already said—where can be the propriety of requiring

the pleader to aver that "The subscribers are a majority of the taxpayers of the town," excluding those who *are not taxpayers*? This language seems absurd enough and yet why is it not carrying out the argument to its logical conclusion?

The contention that the statute provides that the petitioners must state "that they are *such* a majority," and 89
that the work "such" refers to a majority, after excluding those taxed for dogs, loses its force when it is remembered that the same word appears in chap. 907 of the laws of 1869, and therefore cannot with propriety be said to refer to a clause which does not appear at all in the original act.

There is no pretense that in fact any person taxed only for dogs or highways, signed the petition or was counted by the judge, the point argued is purely a technical one of statutory construction, and for the reasons given it 90
must be overruled.

The Federal Courts, which have with great unanimity sustained the validity of municipal bonds, should hesitate long, before accepting the forced and narrow interpretation contended for by the defendant. These solemn obligations, issued to invite the investors of the world, should not be invalidated except for grave and serious infirmities.

Even if the question were a doubtful one, a construction should be given to the statute, which upholds the bonds rather than one which turns them to ashes in the 91
hands of a *bona fide* holder.

The views here expressed were entertained by the learned judge who wrote the opinion in Whiting vs. The Town of Potter, 18 Blatch, 165. The reasoning there, by implication at least, disposes of the question here.

It is of course unnecessary to discuss the same proposition with reference to the judgment; if the words were not needed in the petition, they were not needed in the judgment.

92

The statute provides that the review of the proceedings of the county judge *shall* be by *certiorari* and it may well be doubted, in view of the facts, the town having received and retained the stock and paid interest for two or three years, whether the objections raised, even if available in a direct proceeding, can be taken advantage of in a suit by a *bona fide* holder.

Whiting vs. Town of Potter, supra.

Miller vs. Town of Berlin, 13 Blatch, 245.

Platt vs. Town of Orleans, 9 Otto, 676.
County of Tipton vs. Locomotive Works, 13 Otto, 523
Walnut vs. Wade, 13 *id*, 683.
Menasha vs. Hazard, 12 Otto, 81.
Block vs. Commrs., 9 Otto, 686.
93 Johnson Co., vs. January, 4, Otto 202.
Lincoln vs. Davenport, 4 Otto, 801.
Schuyler vs. Thomas, 8 Otto, 169.
San Antonio vs. Mehaffy, 6 Otto, 312.
Coloma vs Eaves, 2 Otto, 484.
Dillon on Mund, Corp'ns, sec. 418.
Hackett vs. Ottawa, 9 Otto, 86.
Weyanwega vs. Ayling, 9 Otto, 112.

I have examined the other propositions argued, and think none of the positions well taken.

94 Since the foregoing was written, I have had a consultation with the circuit judge and have concluded, in view of the contrary opinion expressed by him in Cowdrey vs. The Town of Caneadea, 16 Fed. Rep., 532, and in view of the fact that the validity of other large issues of bonds depends upon the determination of these identical questions, that the most satisfactory disposition that can be made of this motion, is to set aside the verdict and order a new trial before the two judges sitting together.

New trial ordered.

95 UNITED STATES OF AMERICA,
Circuit Court Clerk's Office, } ss:
Northern District of New York.

I, William S. Doolittle, clerk of said Court, do hereby certify that I have compared the annexed copy of decision, COXE, J., in re George L. Rich vs. The Town of Mentz, and the endorsements thereupon, with the originals, now on file in this office, and that the same is a correct transcript therefrom, and of the whole of said originals.

96 In testimony whereof, I have caused the seal of the said Court to be affixed at the [L. S.] City of Utica, in said district, this 11th day of October, A. D. 1886.

W. S. DOOLITTLE,
Clerk.

United States Circuit Court, for the Northern District of New York.

GEORGE L. RICH,
against
THE TOWN OF MENTZ.

Before WALLACE and COXE, JJ.

WALLACE, J. 97

The same questions arise in this case as were presented in Cowdrey vs. Town of Caneadea, (16 Fed. Rep., 533,) where it was ruled that the bonds of the town were void, because the county judge did not adjudicate that the requisite majority of taxpayers, had consented to the creation of the bonds. No reasons have been advanced in the arguments of counsel that are deemed sufficient to change the conclusions reached in the Caneadea case. It is proper, however, to advert to an argument that was urged in that case and considered, but not discussed in 98
the opinion, and which has been urged again here. It is insisted that because the amended act of 1871 defines the term taxpayer "when used in this act," to mean such taxpayers as are not assessed for dogs or highway tax only, it is not necessary to comply with the explicit language of this act, as to the form and substance of the petition.

The petition is the basis and ground work of the whole bonding proceeding. When the amended act was passed, many of these proceedings had been set aside by the courts of this State, because of defects of form in the 99
petition, and it was the well settled law of the State courts that any such defect was jurisdictional, and rendered the whole proceeding futile. Speaking of the act of 1869, the Court of Appeals said in The People vs. Smith, 45 N. Y., 772, "The authority conferred by the act must be exercised in strict conformity to, and by a rigid compliance with the letter and spirit of the statute." The first section of the amended act provides, in language as explicit as could be employed, that the petition verified by one of the petitioners shall set forth that the 100
petitioners are a majority of taxpayers of the town, who are taxed or assessed for property "not including those taxed for dogs or highway tax only. It subsequently provides that the word taxpayer, "when used in this act," shall mean "any corporation or person assessed or taxed for property * * * * not including those taxed for dogs or highway tax only." Section two, makes it the duty of the county judge "to proceed and take proof as to the said allegations in the

petition," and if he finds that the requisite majority of taxpayers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the taxpayers who apply are a majority of the designated class, the petition would doubtless be sufficient if it alleged that they were a majority of the taxpayers of the town. And in this view, there was no need of amending the act of 1869 in this behalf.

101

If the argument for the plaintiff is sound, this explicit provision is meaningless. It is not to be assumed that the legislature did not mean anything by the language which they so carefully employed. It is not difficult to apprehend what the legislature meant by defining the the word taxpayer. It occurs several times in the act. It was defined for convenience in order to avoid repetition of description whenever the word was used in the act, and, in order that there should be no room for doubt, what kind of a taxpayer was meant whenever the word was used.

102

As it seems to me, the real question in this case is not whether the county judge made an adjudication which is binding upon the defendant under the rules of law which control a court or officer exercising a special statutory power, and which requires every step to be in strict conformity with the statute which confers the power, but whether the acts of the legislature are not to be treated as creating a jurisdiction of a special character which cannot be assailed collaterally, but in which all errors of fact and of law, even those respecting the existence of jurisdictional conditions, are to be corrected in the proceeding itself, upon a review by the appellate tribunals. There is much to be said in support of the latter suggestion Munson vs. Town of Lyons, 12 Blatchf., 539.

103

As one of the cases now pending in this Court, and presenting the same question as this involves, a sufficient sum to be reviewed by the Supreme Court, and is to be presented to that Court, all proceedings in this case will be stayed, and no judgment be entered until the decision of that case on writ of error, or until the further order of this Court.

104

United States Circuit Court, Northern District of New York.

GEORGE L. RICH
vs.
THE TOWN OF MENTZ.

COXE, J.

I concur in the disposition made of this case; but for the reasons heretofore stated by me, (Rich vs. town of Mentz, 18 Fed. Rep., 52, and Chandler vs. town of Attica, Id., 299,) I cannot agree with the circuit judge in the construction placed by him upon the act of 1871. 105

UNITED STATES OF AMERICA,
Circuit Court Clerk's Office, } ss:
Northern District of New York.

I, William S. Doolittle, clerk of said court, do hereby certify that I have compared the annexed copy of opinion, Wallace, J., Coxe, J., concuring, in re Geo. L. Rich, vs. the town of Mentz, and the endorsements thereupon, with the original now on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original. 106

In testimony whereof, I have caused the seal of the said court to be affixed at the city
[L. S.] of Utica, in said district, this 11th day of October, A. D., 1886.

W. S. DOOLITTLE,
Clerk. 107

UNITED STATES SUPREME COURT.

GEORGE L. RICH, Pl'ff in Error,
vs.
THE TOWN OF MENTZ, Def't in Error. } Notice of Appearance, &c.

Due service of citation in this cause upon Defendant in Error is admitted: and I appear herein as Attorney for said Defendant in Error, and waive Special Assignment of Errors and Joinder in Error.

Auburn, January 15, 1887.

[SEAL OF COURT.]

F. D. WRIGHT,
Attorney for Def't in Error.

To JAMES R. COX, Esq.,
Att'y for Pl'ff in Error.

Copy filed Utica, N. Y., February 17, 1887.

W. S. DOOLITTLE,
Clerk U. S. Cir't Ct. N. Dist. N. Y.

petition," and if he finds that the requisite majority of taxpayers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the taxpayers who apply are a majority of the designated class, the petition would doubtless be sufficient if it alleged that they were a majority of the taxpayers of the town. And in this view, there was no need of amending the act of 1869 in this behalf.

If the argument for the plaintiff is sound, this explicit provision is meaningless. It is not to be assumed that the legislature did not mean anything by the language which they so carefully employed. It is not difficult to apprehend what the legislature meant by defining the the word taxpayer. It occurs several times in the act. It was defined for convenience in order to avoid repetition of description whenever the word was used in the act, and, in order that there should be no room for doubt, what kind of a taxpayer was meant whenever the word was used.

As it seems to me, the real question in this case is not whether the county judge made an adjudication which is binding upon the defendant under the rules of law which control a court or officer exercising a special statutory power, and which requires every step to be in strict conformity with the statute which confers the power, but whether the acts of the legislature are not to be treated as creating a jurisdiction of a special character which cannot be assailed collaterally, but in which all errors of fact and of law, even those respecting the existence of jurisdictional conditions, are to be corrected in the proceeding itself, upon a review by the appellate tribunals. There is much to be said in support of the latter suggestion Munson vs. Town of Lyons, 12 Blatchf., 539.

As one of the cases now pending in this Court, and presenting the same question as this involves, a sufficient sum to be reviewed by the Supreme Court, and is to be presented to that Court, all proceedings in this case will be stayed, and no judgment be entered until the decision of that case on writ of error, or until the further order of this Court.

United States Circuit Court, Northern District of New York.

GEORGE L. RICH
vs.
THE TOWN OF MENTZ.

COXE, J.

I concur in the disposition made of this case; but for the reasons heretofore stated by me, (Rich vs. town of Mentz, 18 Fed. Rep., 52, and Chandler vs. town of Attica, Id., 299,) I cannot agree with the circuit judge in the construction placed by him upon the act of 1871. 105

UNITED STATES OF AMERICA,
Circuit Court Clerk's Office, } ss:
Northern District of New York.

I, William S. Doolittle, clerk of said court, do hereby certify that I have compared the annexed copy of opinion, Wallace, J., Coxe, J., concuring, in re Geo. L. Rich, vs. the town of Mentz, and the endorsements thereupon, with the original now on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original. 106

In testimony whereof, I have caused the seal of the said court to be affixed at the city [L. S.] of Utica, in said district, this 11th day of October, A. D., 1886.

W. S. DOOLITTLE,
Clerk. 107

UNITED STATES SUPREME COURT.

GEORGE L. RICH, Pl'ff in Error,
vs.
THE TOWN OF MENTZ, Def't in Error. } Notice of Appearance, &c.

Due service of citation in this cause upon Defendant in Error is admitted: and I appear herein as Attorney for said Defendant in Error, and waive Special Assignment of Errors and Joinder in Error.

Auburn, January 15, 1887.

[SEAL OF COURT.]

F. D. WRIGHT,
Attorney for Def't in Error.

To JAMES R. COX, Esq.,
Att'y for Pl'ff in Error.

Copy filed Utica, N. Y., February 17, 1887.

W. S. DOOLITTLE,
Clerk U. S. Cir't Ct. N. Dist. N. Y.

CLERK

UNITED STATES SUPREME COURT.

No. 229, October, 1889.

GEORGE L. RICH, Plaintiff,
vs.
THE TOWN OF MENTZ, Defendant

Brief for Plaintiff in Error.

Action on town bonds issued in aid of a railroad. Amount of interest *due* upon the bonds was $2,836.25. But as the judges holding the court were *divided in opinion*, upon a controlling question, (see certificate of division, p. 16 of record), the case is brought to this court.

The differing opinions of the judges, WALLACE and COXE, are found at pp. 20 to 26 of Record, and sufficiently set forth the whole question.

It is true that long *after* these bonds were issued, and in the hands of *bona fide* purchasers, the courts of this State held in accordance with the *present* opinion of Judge WALLACE. The cases are as follows:

People vs. Spencer, 55 N. Y. 1, where the court held proceedings void on *certiorari*, because petition did not affirm that city of *Rochester* was in the state of New York, remarking (at page 7), that they *were not doing any injustice to any one*, as no bonds had been issued.

This extreme doctrine was promulged in November, 1873, and our bonds were issued in July, 1872.

It will be observed that the statute in question, (recited in the Record, p. 20), prescribes what *shall be set forth* in the petition; but does not require that the petition shall state in terms the fact, that the railroad intended to be aided *is in this state;* but only requires that the railroad be *in fact* in this state.

(As if there was any danger of a town in the state of New York bonding to aid a railroad in some other state).

The same frivolous point dignified in 1879.

Angel vs. Hope, 17 Hun., 381.

The next case is also on *certiorari* to prevent the issue of bonds, and is in the same book, November, 1873.

People vs. Smith, 55 N. Y., 135, where, following out the doctrine of the former case, the court, reaching for the conclusion that the issue of bonds must be prevented, went so far as to consider the "*dogs and highwaymen*" as *tax-payers* of the town, although they are especially and affirmatively *enacted not to be tax payers*, by the very language of the first section of the act, as amended in 1871, (and as recited at page 20 of Record).

The court remarks: (*top of page* 138).

"*The act excluded certain tax-payers from the* "*class of qualified petitioners*," *etc.*; refusing to see that those excluded were *not* tax-payers.

The next case was (in 1879).

Wellsboro vs. R. R. Co., 76 N. Y., 182.

When Judge ANDREWS again does violence to the statute in remarking (bottom of page 184), "*The petition* "*may be true*, although the petitioners are less "than a majority of the tax-payers excluding *the* "*classes of tax-payers who are not qualified peti-* "*tioners*," and making the decision to turn upon the language of the statute thus distorted. (The error here consists in regarding dogs and highwaymen as tax-payers).

The next case is:

Metzger vs. R. R. Co., 79 N. Y. 171. But the *particular defect* in the petition on which the case turned before the referee (the same defect as in the foregoing case) is not *disclosed*; the courts restrained the collector of the town from paying over money by him received to pay interest on the bonds in the hands of the Railroad Company.

Yet it seems that Judge WALLACE, in U. S. Circuit Court, had overruled this same objection, and enforced the payment of coupons of those bonds.

(See 101 N. Y., p. 494).

After these decisions, all of them long *after* our bonds were issued, our Court of Appeals was prepared by a vote of 4 to 3 to decide the case of *Craig vs. Andes* (93 N. Y., 405), which, however, carries its own refutation, as exhibited in the dissenting opinion, (p. 419, etc).

Yet our Court of Appeals in 1886, (see *Tingue vs. Portchester*, 101 N. Y., 298–299), *abandon* the foregoing extreme doctrine, and hold, that where the statute required, (to confer jurisdiction), that the petition should be signed by one-third of the persons *owning the land;* it was not necessary that the petition should on its face *state that fact* of ownership in terms. It was quite sufficient, if in fact the signers of the petition were *one third* of the *owners.*

To same effect *Hills vs. Peekskill*, 101 N. Y., 493.

The awkward position of the Court of Appeals of New York, is exhibited in *Ontario vs. Hill*, 99 N. Y., 330, where the court shrinks from the results of its own logic; when the holding is, that although "the fact of a majority of consentors is to "*be proved by the affidavit,*" such "*proof*" excuses the commissioners, for issuing bonds, but it does not authorize the investor to purchase them, and when he sues for his interest, he is bound to

exclude *all sorts* of non-tax-payers, as that Section 1 carefully defines "*tax-payers.*"

These words, "*such majority of tax-payers,*" are found in the original Act of 1869, where the word "*such*" clearly refers to the last tax-list and representation of property, and cannot be made to refer to *any class of non-tax-payers.*

So in *Stephenson vs. Short*, 92 N. Y. 439,

People vs. Port Jervis, 100 N. Y., 284.

And *Tingue vs. Port Chester*, 101 N. Y., 499.

B. And now in 1886, our COURT OF APPEALS, practically admit that their former doctrine was *extreme*, and refuse to carry it out to its logical results.

Hills vs. Peekskill, 101 N. Y., 491.

C. In *People vs. Cook*, 108 N. Y., 509, the court attempts a "*satisfactory answer*" to the definition of "*tax-payers* given in the statute.

We are told that "*this definition was given to avoid* "*useless repetition*, and IS CONFINED TO ITS USE in the "Act itself." Implying that the public have no authority to act upon the definition, and that the court has authority to restrict the public reliance.

Whereas, we claim that the public, and especially *non-residents*, (who have had no warning of this restrictive function of the court, which tends toward assumption of the *veto* power possessed by the governor alone), have the right to rely upon this definition, and regulate their action accordingly. Surely the court never *claimed* this power before.

D. It is not pretended that there is a *single one name* on this petition, of a person excluded by statute, (taxed for dog or highway labor), but only that neither petition

nor judgment of the county judge, (p. 13 of Record), excludes non-tax-payers *in terms.*

> That judgment affirms the fact of the petitioners being a majority of tax-payers, of *property* assessed on the list, and that they are taxed for a majority of the property so assessed. *It follows the statute exactly.* (Record, fols. 50, 51).

> (A copy of the third and fourth sections of the Act, chap. 925 of 1871, is hereto annexed.)

E. The office of the petition is, merely to authorize enquiry into the facts, (93 N. Y., 421). It is not taken to prove *anything*, except the desire for judicial examination, and may be likened to the declaration or complaint in an action, which although possibly liable to *special demurrer;* yet, after judgment, when attacked collaterally, and it is obvious that the proofs taken must have covered the alleged defect, no court ever holds the judg-

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A more recent deliverance on this subject of legislative definitions, is found in a late case, (*Town of Solon vs. Williamsburgh Savings Bank*, 114 N. Y. 131) viz:

"The use made of the word in that connection by"
"the statute, would seem to be a legislative interpreta-"
"tion of it for the purposes of the Act; and thus give"
"to the phrase in question, of the Petition, the requisite"
"import, and make it correspond in that respect with"
"the affidavit of verification, and the adjudication, as"
"made by the County Judge."

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> Thayer vs. Marsh, 75 N. Y., 342.
>
> 1 Greenl. Evid., Sec. 534 and cases cited.
>
> *Sheldon vs. Wright*, 5 N. Y., 497.

F. Clearly this petition may fairly be read and understood, as affirming "*tax-payers*" alone, and not "dogs or highwaymen," or any other non-tax payers have signed it.

And if there is enough in it of correct language, to call for the reasonable judicial construction of the county judge, then he acquired jurisdiction; particularly, as *at that time* no court had announced such an *extreme* construction as *afterward* prevailed on *certiorari.*

The remarks of Ch. J. Shaw in *Betts vs. Bagley*, (12 Pick'g 582), are quite applicable.

And see remarks and cases cited.

II. Phil. Evid. (5th Am. Ed.) Cowen and Hill's Notes, p. 162, to the effect that, "Whenever the matter consti- "tuting jurisdiction, is the same with that which is to be "judicially heard and determined on a trial, it is review- "able only by a direct proceeding, and is not subject to "collateral objection."

See also *Taylor vs. Williams*, 20 John, 21.

Cunningham vs. Bucklin, 8 Cow., 187.

G. In the case of *Platt vs. Orleans*, (9 Otto, 676), this precise objection was taken at every stage, but overruled by *Judge Wallace;* and although brought into this court by Writ of Error, and "*pressed upon the attention*, "it was held that *there was nothing in it.*"

By the record in that case and the brief of the plaintiff in error, this point, (about dogs, etc.,) was elaborated, repeated and expanded.

Judge Wallace had overruled it in *Munson vs. Lyons*, (9 *Otto*, 684), and also in the unreported case of *Metzger* (mentioned in 101 N. Y., p. 494), but gives no reason now for his change of mind.

In that case of *Munson vs. Lyons*, he charged the jury as stated, (99 U. S. 686), in respect of this same objection, as follows:

> "To imply the intent that such obligations, "after they are negotiated, shall be vulnerable to "the objections here urged, would be to impute "bad faith to the authors of such legislation, "towards those who are to be induced to invest in "such bonds."

H. The adjudication in the *Canadea* case, (16 *Fed. Reporter*, 25), condemned by Judge Wallace, (Record, p. 25), explicitly follows the statute, which prescribes exactly what shall be adjudged.

(See Sec. 2 annexed).

The amending act of 1871 made no change in this respect; the words are *the same* in both acts.

The county judge is to take proof as to the allegations in the petition; and "if it shall satisfactorily appear to "him that the said petitioners * * * do "represent a majority of the tax-payers, * * as "shown by the last tax-list, and do represent a majority "of the taxable property, HE SHALL SO ADJUDGE AND "DETERMINE, and cause the same to be entered of record, "and SUCH JUDGMENT shall have the same force and effect "as other judgments."

I. The learned judge (Wallace) seems to err in his appreciation of the statute, (see Record, p. 25, fol. 98), in insisting upon the existence of *two classes of tax-payers*, where the statute explicitly affirms but *one class*, in respect to this statute.

Again, (at Fol. 100), he affirms that "the first section "* * * provides in language *as explicit* "as could be employed," that the petition should in terms and express words, exclude *dogs*, etc. (See Record, p. 20, fol. 79), and in this he is mistaken.

But even our Court of Appeals gives a very different construction to such a statute, (see 100 N. Y., 284, 101 N. Y., 298), where the court remarks: "The fact that "the petitioners were not on the face of the petition "alleged to be owners of land on the proposed street, "did not tend to negative that fact. The statute does "not require that the fact shall be stated in the petition," etc., etc.

The act required, (101 N. Y., 298), as an initial proceeding in the laying out of a street, * * a petition "*signed by one-third of the persons owning "land on the line thereof.*" The petition did not show on its face, that the persons who signed it, were such owners.

The subsequent adjudication opening up the new street, was attacked collaterally; but the court held it good against this objection.

Finally; these bonds in this case were issued and purchased in 1872, and at that time and down to November, 1873, no court had announced or suggested the extreme and hypercritical doctrine subsequently invented. Shall the rights of *bona fide* holders of bonds, with a regular county judge's judgment behind them, be sacrificed by the subsequent decisions of the local court, which no lawyer could have anticipated? (Douglas vs. Pike, 101 U. S, 688, and cases cited).

AUBURN, N. Y., September, 1889.

JAMES R. COX,
Att'y for Plaintiff.

APPENDIX.

Chapter 925 of the Acts of New York of 1871, amending the Act of 1869 so as to read as follows:

(The first section is in *Record*, p. 20).

"SECTION 2. It shall be the duty of the said judge, "at the time and place named in the said notice, to pro- "ceed and take proof as to the said allegations in said "petition; and if it shall appear satisfactorily to him, "that the said petitioners and such other tax-payers of "said municipal corporation, as may then and there "appear before him, and express a desire to join as peti- "tioners in said petition, do represent a majority of the "tax-payers * * * and do represent a

"majority of the taxable property upon said list or roll, "he shall so adjudge and determine, and cause the same "to be entered of record in the office of the clerk of the "county, * * * and such judgment and "the record thereof, shall have the same force and effect "as other judgments and records in Courts of Record "in this state. * * * * * *

"The judge shall file the petition as part of the judg- "ment-roll," and shall publish notice thereof for three weeks, in the newspaper.

"SEC. 4. Review of proceedings under the acts here- "by amended, shall be by *certiorari;* and no Writ of "Certiorari shall be allowed, unless within sixty days "after the last publication of notice of the judge's final "determination; on the return of the certiorari, the "court out of which the same issued, shall proceed to "consider the matter brought up thereby, and shall review "all questions of law and of fact, determined for or "against either party, by the county judge.

"And the said Courts or Court of Appeals, in appeals "now pending, and in all future proceedings, may reverse, "or affirm, or modify, in all questions of law or fact, his "final determination, or may remand the whole matter "back to said county judge, to be again heard and deter- "mined by him."

"And it may by order, direct that he proceed thereon "*de novo*, in the same manner, and with the same effect, "as if he had taken no action thereon, or it may by such "order, specify how and in what particulars he shall hear "and determine the same on such remanding thereof."

"Applications for *certiorari* shall be on notice."

"On review, persons taxed for dogs, or highway tax "only, shall not be counted as tax-payers, unless that "claim was made before the county judge. The county "judge shall forthwith proceed to carry into effect all "orders of any court on review, under this act."

"SEC. 5 Provides in respect to the agreement between the commissioners who issue the bonds, and the Railroad Company also: "The Supreme Court shall also by the "usual process of said court in like cases, have power at "any time, to prevent by injunction the issue of said "bonds, or any portion thereof, on notice, and for good "cause shown; and any justice of said court, may grant "a temporary injunction, until such motion can be heard."

SEC. 6 (Amending Sec. 4 of former act), provides for a vacancy in the office of commissioners, and if any of the bonds shall be payable within less than thirty years, not over ten per cent. of them shall come due in any one year, etc.

SEC. 8. "This act shall take effect immediately."

Supreme Court U. S.
FILED.
JAN 2 1890
JAMES H. McKENNEY,

SUPREME COURT

—OF THE—

UNITED STATES.

GEORGE L. RICH,
Plaintiff in Error,

against

THE TOWN OF MENTZ,
Defendant in Error.

POINTS AND BRIEF

—FOR—

The Defendant in Error.

F. D. WRIGHT,
of Counsel for the Defendant in Error.
Auburn, N. Y.

AUBURN, N. Y.:
MORNING DISPATCH PRINT,
1889.

SUPREME COURT

OF THE UNITED STATES.

GEORGE L. RICH
Plaintiff in Error,
vs.
THE TOWN OF MENTZ,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR:

STATEMENT OF FACTS.

This action was to recover the amount of sixty coupons of $35 each, being the interest on certain municipal bonds, claimed to have been issued by the defendant in error, on July 15, 1872, in aid of the Cayuga Northern Railroad Company.

The plaintiff claimed to own and hold five of such bonds of $1000 each, being part of an issue of thirty bonds of the same amount, and purporting to be payable thirty years from July 15, 1872, with semi-annual interest, evidenced by interest coupons of $35 each.

The bonds held by the plaintiff, were Nos. 21, 22, 23, 24, and 25 of said issue of thirty bonds of $1000 each.

This action was commenced on March 22, 1882.

The amount claimed to be owing on these sixty interest coupons was the sum of $2,250.

The cause was tried before Hon. William J. Wallace Circuit Judge of the Second Circuit and Hon. Alfred C. Coxe, United States District Judge of the northern district of New York.

The Circuit Judge was of opinion that the petition to the County Judge on which all of the proceedings was based, was insufficient and conferred no jurisdiction and that the adjudication made upon it was also void, for the reasons stated by him in his opinion.

The District Judge held that jurisdiction was obtained and that the adjudication was valid, admitting however, that if the construction put upon the petition by the Circuit Judge was the true one (a construction, which has since been upheld by the Court of Appeals of the State of New York), that no jurisdiction was obtained and the bonds were void.

On June 15, 1886 (upon further consideration of the case) judgment was ordered for the defendant. The Court below at the request of the plaintiff made the certificate appearing in the error book at pages 16, 17 and the case comes before this court on the questions contained in such certificate.

POINTS FOR DEFENDANT IN ERROR.

It will be seen, that by the statute of the State of New York, as amended in 1871 (and after which amendment the petition was made in this case on which the proceedings are all based,) *only a designated class of taxpayers were authorized to petition.* The statute (chapter 925, laws of the State of New York, 1871, section 1), prescribes that

> "Whenever a majority of the taxpayers of "any municipal corporation in this state, who "are taxed or assessed for property *not includ-* "*ing those taxed for dogs or highway tax only* "upon the last preceding assessment roll "or tax test of such corporations and who "are assessed or taxed or who represent a ma- "jority of the taxable property upon said last "assessment roll or tax list, shall make applica-

"tion to the county judge of the county * * *
"by petition, verified by one of the petitioners
"setting forth that they are taxed for or repre-
"sent such majority of taxable property, it
"shall be the duty of the County Judge to
"order, etc.

It was not sufficient under the statute that the petition should show that the petitioners constituted a majority of the taxpayers of the town, simply but it must show that they constituted a majority of the *designated* class of taxpayers,—a majority of those taxed or property *other* than for dogs and aside from thosef taxed for highway labor only.

The statute requires that the petition *shall set forth* that the petitioners are *such* a majority of tax payers and are taxed for or represent *such a* majority of taxable property, that is such a majority, *not including* those taxed for dogs and highway tax only.

The object of the statute is evident. It is that the town should be thus incumbered only by a majority of the *designated* class, *who alone* were enabled by the statute to become petitioners.

The fact that the petitioners constituted a majority of the tax payers of the town, on the last preceding assessment roll or tax list of the town, or that they represented a majority of the taxable property within said town, *was wholly immaterial.*

The statute gave such persons no authority to petition. They were not the *class designated by the statute* as amended in 1871. The class designated by the statute was those persons who constitute such majority, after excluding the class of taxpayers, taxed for dogs or highway tax only.

That the petition was wholly insufficient to confer jurisdiction on the County Judge.

Vide People *ex rel* Green vs. Smith and others 55 N. Y. Rep. 135.

People vs. Spencer, Id. Page 1.

Town of Wellsboro vs. N. Y. C. R. R. Co., 76 N. Y., 182 Metzger vs. the Attica and Arcade R. R. Co., 79 N. Y., 172 Wilson vs. The Town of Canadea 15 Hun. (N. Y. Supreme Court.) 263 Town of Mentz vs. Cook, 108 N. Y. R. 504. Cagwin vs. Town of Hancock, 84 N. Y., 532.

In the People *ex rel* Green *et al* vs. Smith *et al* 55 N. Y., 135-7 (above cited) the Court say "The act of 1869 was amended in 1871 (Laws 1871 chapter 825) so as to require that the petition shall show that the petitioners were a majority of the taxpayers of the municipal corporation to which the petition relates, *not including those taxed for dogs or way taxhigh only*. This amendment was in force when the petition in this case was presented to the County Judge. The amendment of 1871 made an important change in that law. It excluded certain taxpayers from the class of qualified petitioners, and made it necessary, before a debt could be created under the act, that a majority of the taxpayers, other than those assessed for dogs or highway tax only, should assent thereto. Under the act of 1869, the creation of the debt was authorized if the majority of the whole number of taxpayers in the locality, representing a majority of the taxable property consented. The assenting taxpayers might constitute a majority of the tax-payers and yet not be a majority, excluding those taxed for dogs or highway tax only. The object of the amendment of 1871 was to prevent the creation of a debt for railroad purposes by municipal corporations, unless a majority of the taxpayers, having a substantial pecuniary interest in the question, should assent to it.

"The petition in this case did not show that the petitioners were a majority of the taxpayers of the town of Gorham, excluding those tax-d for dogs or highway tax only, and the County Judge acquired no jurisdiction of the proceeding. His authority could only be invoked by the presentation of a peti-

tion in conformity with the statute, and he could not on his own motion, dispense with the performance of a condition, precedent to the exercise of the authority conferred by the act."

People *ex rel* Green vs. Smith 55 N. Y. 137. Vide also—The Town of Mentz vs. Cook, N. Y. R. 108 N. Y.—504-9.

It is a familiar principle founded both upon elementary principles and repeated adjudications that in such proceedings "*every step, required to confer* "*the power must be shown to have been taken in strict* "*conformity to the statute.*

The People ag'st. Halbrook 46 N. Y. 110-113.

And no jurisdiction is obtained unless the proceedings strictly follow the statute.

It was imperative that the petition in order to confer jurisdiction upon the County Judge to take any step whatever, should have contained the foregoing allegation.

It did not contain it.

The petition in question was evidently drawn under the act of 1869 (Laws of New York, 1869, Chap. 907, Sec. 1). The language of that act so far as it is material is as follows:

"Whenever a majority of the taxpayers of any municipal corporation in this state, whose names appear upon the last preceding tax list or assessment roll of such corporation, shall make application to the County Judge of the county, in which such corporation is situated, by petition verified by one of the petitioners setting forth that they desire" etc.

No requirement was made in the act of 1869, that the "persons taxed for dogs or highway tax only" could not petition, and the petition in this case was drawn under that act. It will be seen that it almost literally follows the language of that act in the respect referred to, and it will be seen on inspection that the bonds *expressly recite that they are issued under the act of* 1869.

It is evident from the petition, the adjudication and the bonds themselves, that all the proceedings were conducted under the original statute of 1869. But before this petition was drawn or presented, the above statute of 1869 had been amended by Chapter 925 of the Laws of New York 1871, providing as has been seen that only a *designated class* of taxpayers might petition and that that class should not include those taxpayers "who were taxed or assessed for dogs or highway-tax only," and also providing *that the petition must set forth* that fact.

The petition failing to state this material fact, conferred no jurisdiction whatever upon the County Judge and the subsequent proceedings were therefore wholly void.

POINT SECOND.

But on the trial, it was sought to avoid the conclusion, that the County Judge acquired no jurisdiction by the claim that it was not necessary to aver in the petition, that the petitioners constituted the necessary majority excluding the class of taxpayers "taxed for dogs, or highway tax only."

And it will be seen that the District Judge in his opinion sought to uphold the petition upon this ground This claim is based upon the assumption that because section one of the amended act (Act of 1871 defines the word "taxpayer, when used in the act" to mean such taxpayers as are not assessed for dogs or highway tax only," it was not necessary to set forth in the petition that the petitioners constituted the proper majority not *including* that class.

But this construction of the statute cannot obtain. The words of the statute, defining the meaning of the word "taxpayer," "*when used in this act*" were not placed therein to obviate the necessity for the statement of the jurisdictional facts in the petition, but to define *once for all* the class of persons, who were competent petitioners.

The word "*taxpayer*" had been used in the amended act many times previous to this definition, and also, many times afterwards.

In order to avoid a repetition of the sentence "not including those taxed for dogs or highway tax only" in each sentence where the word "taxpayers" occurs, the Legislature once for all defined what class of persons were to be considered "taxpayers," when the words were "used in this act," and that statute in declaring what class of persons were competent to sign these petitions, provided that that person should be deemed a taxpayer, where the word was "used in this act," who was "assessed or taxed for property either individually or as agent * * * or who shall have been intended to have been thus taxed, and shall have paid or are liable to pay tax * * * or the owner of any non-resident lands, taxed as such." All of such persons were made competent to sign, *provided* that none of these persons were taxed for dogs or highway tax only, in which case they were incompetent.

The statute then further proceeded to define the words "tax or assessment roll," when used in the act, as meaning the "roll last completed before the presentation of such petition to the Judge." Neither of the explanatory clauses has any reference to the facts to be stated in the petition and the above clause as to the "tax or assessment roll" simply, defines the particular roll, which is referred to in a previous part of the section.

If the suggestion of the District Judge were to obtain that the use of the word "taxpayers" simply in the petition was sufficient, then the words in the amended act of 1871, "not including those taxed for dogs or highway tax only" are mere surplusage—they would be wholly unnecessary.

It is clear that the definition of the word "taxpayers," as given in the act, was simply to de-

clare the classes of persons who were made competent to sign the petition, *but was not given to obviate the necessity for the statement in the petition of jurisdictional facts.*

And the words of the statute which prescribes that the petition "*shall set forth that the petitioners are such a majority of taxpayers and are taxed for, or represent such a majority of taxable property*" are imperative, and distinctly require that the petition shall show that they constitute such a majority *not including* the class made incompetent by the statute.

The amended statute expressly required that "*the petition shall set forth* that the petitioners are such majority of taxpayers, and are taxed or represent such majority of taxable property."

The words, "*such majority*" clearly means, when considered with the contexts, a majority of the *designated class* of taxpayers, that is, those otherwise competent, not including those taxed for dogs, or highway tax only.

Not only is it evident from the language of the statute that the petition must *set forth* that the petitioners are a majority of that class who alone are competent to petition, but the courts of the State of New York have repeatedly so adjudicated.

Vide the case in the Supreme Court of New York of Wilson vs. The Town of Canadea, 15 Hun. 268, and also the repeated decisions on this question of the New York Court of Appeals, in cases of People ex. rel. Green vs. Smith et al. 55 N. Y. 135.

Town of Wellsboro vs. N. Y. & Hudson R. R. Co., 76 N. Y., 182, Metzgar vs. the Attica and Arcade R. R. Co, 79 N. Y. 171, and lately The Town of Mentz vs. Cook, 108 N. Y. 504-9.

Also Judge Wallace in the case at bar, at folio 98 to 102, uses this emphatic language:

> "It is insisted that because the amended act of "1871 defines the term "taxpayer," "when

"used in this act" to mean such taxpayers as "are not assessed for dogs or highway tax "only, it is not necessary to comply with the "explicit language of this act, as to the form "and substance of the petition. The petition "is the basis and ground work of the whole "bonding proceeding. When the amended "act was passed, many of these proceedings "had been set aside by the courts of this state, "because of defects of form in the petition, "and it was the well settled law of the State "Courts, that any such defect was jurisdic- "tional and rendered the whole proceeding "futile. Speaking of the act of 1868, the "Court of Appeals said in the People vs. Smith, "45 N. Y., 772. "The authority conferred by "the act must be exercised in strict conformity "to, and by a rigid compliance with the letter "and spirit of the statute." The first section "of the amended act provides, in language as "explicit as could be employed, that the peti- "tion verified by one of the petitioners shall "set forth that the petitioners are a majority "of taxpayers of the town, who are taxed or "assessed for property "not including those "taxed for dogs or highway tax only." It "subsequently provides that the word taxpayer "when used in this act, "shall mean" any "corporation or person, assessed or taxed for "property * * * * not includ- "ing those taxed for dogs, or highway tax "only." Section two makes it the duty of the "County Judge "to proceed and take proof as "to the said allegations in the petition," and "if he finds that the requisite majority of tax- "payers who apply on a majority of the desig- "nated class, the petition would doubtless be "sufficient if it alleged that they were a ma-

"jority of the taxpayers of the town, and in "this view, there was no need of amending the "act of 1869 in this behalf.

"If the argument for the plaintiff is sound, "this explicit provision is meaningless. It is "not to be assumed that the Legislature did "not mean anything by the language which "they so carefully employed. It is not difficult "to apprehend what the Legislature meant by "defining the word taxpayer. It occurs sev- "eral times in the act. It was defined for "convenience in order to avoid repetition of "description, whenever the word was used in "the act, and in order that there should be no "room for doubt, what kind of a taxpayer was "meant whenever the word was used."

The above extract from the opinion of the Circuit Judge it is submitted is decisive on the question.

Point Third.

But while the defendant in error contends that the construction of the New York statute of 1871, uniformly given to it by the Courts of that state and also by Judge Wallace in the opinion in this case, above referred to, is the correct one, yet that question it is submitted is not an open one.

I.

"IT IS SETTLED BY REPEATED ADJUDICATIONS OF "THIS COURT THAT THE CONSTRUCTION OF A STATE, "STATUTE BY THE HIGHEST COURT OF THE STATE, NOT "CALLED IN QUESTION BY ANY CONFLICTING DECISION "OF THAT STATE, IS CONCLUSIVE."

Vide Vol. 1 Indexed Digest, U. S. Reports P. 531 Sec. 393.

Randall vs. Brigham, 7 Wallace 523.
16 Wall. 6.
96 U. S. 271.
99 U. S. 406.
12 Blatch 539.

"WHEN THE CONSTRUCTION GIVEN BY THE HIGHEST "COURT OF A STATE TO THE CONSTITUTION OR A "STATUTE OF THAT STATE IS UNIFORM AND SETTLED, "IT IS BINDING ON THE COURTS OF THE UNITED STATES "AS A RULE OF DECISION.'

Vide Vol. 1 (and cases there cited) Indexed Digest U. S. Reports, page 530 Sec. 390.

This court has many times reaffirmed this rule in regard to the construction of the statutes of a state, and has always adopted the construction placed upon them by the highest appellate court of that state.

But the Court of Appeals of the State of New York (the highest Appellate Court of that State has several times had occasion to construe the above statute, and has given it the construction which the defendant maintains is the true one and should obtain here.

Vide People ex rel Green vs. Smith, et al 55 N. Y. 135.

Town of Wellsboro vs. New York & H. R. R., R. 76N. Y. 12.

Metzger vs Attica and Arcade R. R., 79 N. Y., 171, 84 N. Y. 532.

The Town of Mentz, appellant, vs. Cook 101 N. Y R. 504.

In this last case the Court of Appeals of the State of New York say on this precise question:

"The petition was presented after the amend-
"ment of 1871 to the act of 1869 and was defect-
"ive in not averring that the petitioners were a
"majority of the taxpayers of the Town of
"Mentz excluding those taxed for dogs or high-
"way tax only. *The fatal character of the*
"*defect has been so often adjudged in this court*
"*as to end further discussion.*"

The court then discusses the suggestion urged now, that the definition of the word "taxpayers" as de-

fined by the statute obviates the necessity of the express allegation required by section one of the amended act of 1871 (chapter 925 of the Laws of New York 1871) and says:

"The argument advanced is that the word "taxpayers, as used in the act is declared to "mean taxpayers exclusive of those taxed for "dogs or highway tax only and that it is illogi- "cal to deny to the word, when used in a petition "under the act, the meaning accredited to it by "the act itself.

"The suggestion is by no means conclusive and "admits of a satisfactory answer. *The definition "was given to avoid useless repetition and is "confined to in its use in the act itself.*

"The petition is required to be verified and to "show on its face, the consent of the requisite "majority and is not satisfied by an ambiguous "oath, true in one sense and not true in another: "We are not convinced that we ought to over- "rule our existing line of decisions, for the "reason assigned. This defect therefore was "fatal and the Special Term correctly decided "that the bonds were invalid."

The Town of Mentz vs. Cook,
108 N. Y., R. 504-9.

The petition to the County Judge gave no jurisdiction to him to make any adjudication in the premises for the above reason the Court of last resort of the State of New York has repeatedly so held—and the judgment of the Circuit Judge in this case, so holding will it is submitted be affirmed by this Court.

II.

But again not only did the petition not confer jurisdiction, for the reason *that it did not allege that the petitioners constituted a majority of the class designated*

by the statute as competent petitioners, but the petition in other respects did not comply with the amended act of 1871.

Not only does the petition fail to show that they were a majority of the class designated by the statute as alone competent to petition, but instead of following the words of the *amended statute* in other respects the petition follows the language of the statute of 1869.

It does not state that the petitioners are a "*majority of the taxpayers who are assessed or taxed for property on the last preceding assessment roll or tax list of such corporation and who are assessed or taxed, or who represent a majority of the taxable property upon said last assessment roll or tax list,*" as is required *by the amended act of* 1871, but it simply follows the language of the *act of* 1869, and avers "that they are a majority of the taxpayers of "the town of Mentz, in the County of Cayuga and "State of New York, whose *names appear upon the "last preceding* assessment roll or tax list of said "town of Mentz, as owning or representing a majority of the taxable property in the corporate limits "of the said town of Mentz; that they "are such a majority of taxpayers, and are "taxed or assessed for or represent such a majority of taxable property." The petition does not allege the matters required by the Act of 1871.

It will be seen then, that the petition gave no jurisdiction to the officer making the adjudication, for the reasons above given, viz.:

I That it did not show that the petitioners constituted a majority of the designated class which by statute was alone competent to petition.

II. That it did not show that they were a majority of such taxpayers who are assessed or taxed for property upon the last preceding assessment roll or

tax list of the corporation, and who are assessed or taxed or who represent a majority of the taxable property upon said last assessment roll or tax list.

Point Fourth.

THE ADJUDICATION OF THE COUNTY JUDGE WAS ALSO VOID FOR THE REASON HERETOFORE CONSIDERED, AND ALSO IT WAS A NULLITY FOR THE REASON THAT THE ADJUDICATION DID NOT ASSUME TO DECIDE AND DID NOT DECIDE THAT THE PETITIONERS WERE "A "MAJORITY OF THE TAX-PAYERS WHO ARE "TAXED OR ASSESSED FOR PROPERTY NOT "INCLUDING THOSE TAXED FOR DOGS OR "HIGHWAY LABOR ONLY, UPON THE LAST "PRECEDING ASSESSMENT ROLL OR TAX "LIST OF SUCH CORPORATION AND WHO "ARE ASSESSED OR TAXED OR WHO REPRE-"SENT A MAJORITY OF THE TAXABLE PRO-"PERTY ON SAID LAST ASSESSMENT ROLL "OR TAX LIST."

The adjudication is in the following language:

> "It is adjudged, decreed and determined that "the said petitioners do represent a majority of "the taxpayers of said Town of Mentz, as shown "by the last preceding tax list or assessment "roll, that is to say, the said last tax list or "assessment roll for the year 1871, and do repre-"sent a majority of the taxable property upon "said tax list or assessment roll." (Folio 52 error Book).

It will be seen that the County Judge *did not assume* to decide that the petitioners are a majority of the class which alone by the statute is allowed to petition.

The adjudication in this case was similar to the one in the case of Cowdrey vs. the Town of Canadea, Vide 16 Federal Reports, 532) in which

Judge Wallace held that the adjudication was a nullity, because it failed to decide the above question, and did not even assume to pass upon it.

Judge Wallace in that case uses this language:

> "As the law stood, when the proceedings were "commenced, it was his (the County Judge) pro- "vince to entertain and decide the question "whether a majority of taxpayers of a *desig-* "*nated class* desire that the Town should create "a debt and issue its bonds. If he had assumed "to decide that such majority did desire a crea- "tion of its debt, then it might be competent to "inquire, whether he acquired jurisdiction of the "proceedings upon such a petition as was pre- "sented to him."
>
> "As he did not adjudge that the required "quorum of taxpayers had consented to the "creation of the debt, his order appointing "commissioners to create and issue the bonds "was a nullity." Vide. Cowdrey vs. Town of Canadea, 16 Federal Reports, 532.

In that case the decision was placed upon the ground that the adjudication was fatally defective in not deciding upon all the matters required by the statute. The adjudication in the case at bar was similar, and is also a nullity for the like reason.

Point Fifth.

It will be observed there are no recitals in the bonds from which the plaintiff can claim that the defendant is estopped from availing itself of its defense.

The bonds do not recite that they are issued in conformity to any law in existence when they were issued, as will be seen by inspection—for the law of 1869 had been in its provisions authorizing the institution of these proceedings *repealed by a subsequent act.* (The act of 1871.)

They do not recite that they were issued under the act of 1871—but on the contrary, they expressly aver that they were issued by virtue of the act passed April 2, 1850, as amended by the act "*passed May* 18, 1869." (Vide Page 4, folio 15 of the Error Book.)

There is no reference whatever in the Bonds to the act which *was alone in force* and under which alone they could be issued, if at all, viz: the act of 1871.

This act was materially different from the act of 1869 — which is mentioned in the bonds and *no attention whatever was paid in the petition* (which appears at folios 43–45) *to the Act of* 1871, but all the petitioner's proceedings were conducted under the act of 1869.

But this act, (section one of the act of 1869,) giving the authority to petition had been repealed and section one of the laws of 1871 substituted in its place, when these proceedings were commenced.

Where bonds recite that they are issued under a certain act, they cannot be supported as issued under a different act. Gilson vs Dayton, 123 U. S. S. C. R., 50.

A recital in municipal bonds does not extend to matters of law and a certificate reciting the actual facts and that thereby the bonds were conformable to law, where judicially they are not, will not make them so. Nor can it work an estoppel, for the defendant to claim the protection of the law.

Lake County vs. Graham, 130 U. S. S. R., 674.

In the case at bar, the bonds do not even recite that they are issued conformably to law.

Point Sixth.

It will be seen that the first two questions certified to this court contained in the certificate at page 16 of the Error Book are in regard to the sufficiency of the petition in this case and the defendant in error, maintains that they should be answered in accordance with the views of the Circuit Judge and with the unbroken and repeated adjudication of the highest Appellate Court of the State of New York.

The remaining two questions are in regard to the adjudication and its sufficiency.

The defendant maintains also that this was clearly insufficient.

It is submitted that the judgment rendered for the defendant in error in this case by the Court below will be affirmed by the Court.

This Court has always held that there is no liability where no jurisdiction has been obtained.

There is no case decided by this court holding that bonds issued under the circumstances which obtain in this case are valid. No question of estoppel and no question simply of irregularity exist in this case The undisputed facts show an entire want of jurisdiction. The bonds were clearly invalid, and the judgment of the Circuit Court should be affirmed.

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